

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 531 of 2020

[Arising out of Order dated 31.01.2020 passed by the National Company Law Tribunal, New Delhi Bench-VI, New Delhi in C.P. No. IB-3228 (ND)/2019].

IN THE MATTER OF:

**Mr. Bhaskar,
S/o Mr. Kailash Ram,
R/o House No. 92, Karchuli,
Kotuli Amyari, Ranikhet
Almora,
Uttarakhand – 263645.**

...Appellant

Versus

**M/s Sai Precious Traexim Pvt. Ltd.
Having its registered office at:
A-14, Lower Ground Floor,
New Friends Colony,
New Delhi – 110025.**

..... Respondent No. 1

**Mr. Ajay Kumar Kathuria
Interim Resolution Professional
Pine View Portfolio Consultants Pvt. Ltd.
[Registration No.
IBBI/IPA-002/IP-N00655/2018-19/12037]
R/o A-139, 2nd Floor,
Shanker Garden, Vikaspuri,
New Delhi.**

.....Respondent No. 2

Present:

For Appellant: Mr. Sushil Aggarwal, Advocate

For Respondent: No Appearance

J U D G M E N T

Venugopal M. J

Heard the Learned Counsel for the Applicant / Appellant in I.A. No. 1343 of 2020. As a matter of fact, the Applicant / Appellant prays for condonation of delay of 16 days in filing the Appeal, on the ground that the free copy of the impugned order dated 31.01.2020 passed by the National Company Law Tribunal, New Delhi Bench-VI, New Delhi in C.P. No. IB-3228 (ND)/2019 was not communicated as per Section 7(7) of the 'I&B' Code. Furthermore, the copy of the impugned order was communicated to the Applicant / Appellant by the representative of the first Respondent on 04.03.2020 and accordingly the Applicant / Appellant had produced the copy of the impugned order from the website of National Company Law Tribunal. Therefore, according to the Applicant / Appellant the instant Appeal was filed within the period of limitation, from the date of knowledge of passing the impugned order. The other plea taken on behalf of the Applicant / Appellant is that the 'Corporate Debtor' was never issued with a notice by the Tribunal, in the application filed by the First Respondent / 'Financial Creditor'.

2. Taking note of the fact that the Applicant / Appellant had averred in I.A. No. 1343 of 2020 that the Appellant to know of the impugned order only on 04.03.2020 through the representative of the First Respondent on being communicated etc., this Tribunal by taking a practical, purposeful, meaningful, pragmatic view and result oriented approach condones the delay in question and disposes of the Interlocutory Application. No costs.

3. The Appellant (one of the erstwhile Director of ‘Corporate Debtor’ – Pine View Portfolio Consultants Pvt. Ltd.) and Member of the Suspended Board of ‘Corporate Debtor’ has filed the instant Appeal, as an ‘*Aggrieved person*’, in respect of the order dated 31.01.2020 passed by the ‘National Company Law Tribunal’, New Delhi Bench-VI, New Delhi in C.P. No. IB-3228 (ND)/2019 in admitting the Section 7 application filed by the First Respondent / Petitioner.

4. The ‘National Company Law Tribunal’, New Delhi Bench-VI, New Delhi while passing the impugned order dated 31.01.2020 interalia at paragraph 5 to 8 had observed the following: -

“5. The applicant further submitted that despite several reminders on the part of the petitioner, the respondent has failed to make the payment of Rs. 29,52,765/- which are due and in default.

6. The respondent did not reply to either the legal notice or the application.

7. Despite opportunity none appeared on behalf of the respondent.

*Proof of service is also annexed with
the main petition.*

*8. Heard the applicant and
peruse the record.”*

and ultimately held that there was Overwhelming evidence to prove the default and on being satisfied that a default amounting to lakhs of rupees had occurred within the meaning of the section 4 of Code and admitted the application by appointing Mr. Ajay Kumar Kathuria, as an ‘Interim Resolution Professional’ and declared moratorium etc.

5. The Learned Counsel for the Appellant contends that the Hon’ble Tribunal never had the occasion to issue notice to the ‘Corporate Debtor’ in the application filed by the first Respondent u/s 7 of the Code. Furthermore, a plea is taken on behalf of the Appellant that service of advance copy of the application to the ‘Corporate Debtor’ cannot be deemed to be ‘Service of Notice’ in the application.

6. It is represented on behalf of the Appellant that neither the First Respondent / Petitioner (‘Financial Creditor’) nor the ‘Corporate Debtor’ was present in any of the hearings before the Tribunal. Therefore, it is the stand of the Appellant that the Tribunal should have dismissed the application filed by the First Respondent / Petitioner for non-prosecution.

7. The Learned Counsel for the Appellant refers to the order passed by the Tribunal on the first date of hearing i.e. 06.12.2019 which is to the following effect:-

“No one is present on behalf of both the parties. Therefore, in the interest of justice, matter is adjourned to 06.12.2019.”

Moreover, on 19.12.2019 (2nd date of hearing) no one from the ‘Financial Creditor’ or ‘Corporate Debtor’ was present and ‘order’ was reserved.

8. The Learned Counsel for the Appellant emphatically takes a plea that there is no ‘Debt’ extended by the First Respondent / ‘Financial Creditor’ to the ‘Corporate Debtor’ and in fact, there is no privity of contract between them. Apart from that, the ‘Debt’ alleged to be due and payable was purportedly paid by the 3rd party, who is not even part of the proceeding before the Tribunal. Besides this, there is no ‘Contract’ with that ‘Third Party’ and the single document attached with the application in regard to alleged ‘Debt’ is ‘Bank Statement’ and that too is of ‘Third Party’.

9. Advancing his arguments, the Learned Counsel for the Appellant strenuously contends that the ‘Bank Statement’ belongs to a third party viz. ‘Taj Consultancy’ which is not even a party to the proceeding before the Tribunal. According to the Appellant, it is alleged that under instructions from one Rajeev Aggarwal who had financial dealings with the First Respondent / ‘Financial Creditor’ transferred Rs. 15 Lakhs through RTGS on 30.01.2019 and Rs. 10 Lakhs through its authorised financial services provider viz. ‘Taj Consultancy’.

10. An argument is projected on the side of the Appellant that Mr. Rajeev Aggarwal is neither a Director nor a shareholder of ‘Corporate Debtor’ and further

there was no independent finding arrived at by the Tribunal as to how a 'Third Party' payment become a 'Financial Debt' or how 'Financial Creditor' had become again 'Financial Creditor' in the absence of any 'Financial Debt' and the impugned order is silent in this regard.

11. The Learned Counsel for the Appellant submits that the 'Corporate Insolvency Resolution Process' proceedings were initiated against the 'Corporate Debtor' by the First Respondent / 'Financial Creditor' with an intention to extort money from the 'Corporate Debtor' by filing frivolous proceedings and not appearing before the Tribunal. Even after providing adequate opportunities, neither the First Respondent / 'Financial Creditor' nor the 2nd Respondent (Interim Resolution Professional) had appeared before this Appellate Tribunal and, therefore, the Appellant prays for setting aside the impugned order passed by the 'Adjudicating Authority' and to allow the 'Appeal' to meet the ends of justice.

12. It comes to be known that before the 'Adjudicating Authority' the First Respondent / 'Financial Creditor' filed an application u/s 7 of the 'I&B' Code and as seen from part IV caption the total amount of debt was mentioned as Rs. 29,50,000/-. The Principal amount was stated to be Rs. 25,00,000/- and the interest was described as Rs. 4,52,765/-. In fact, the loan amount of Rs. 25,00,000/- was disbursed on 30.01.2019 and 31.01.2019 respectively. Added further, the amount purported to be in default, on the date in which the default took place was Rs. 29,52,765/-.

13. The stand of the First Respondent / 'Financial Creditor' is that the First Respondent / 'Financial Creditor', on the instruction of Mr. Rajeev Aggarwal transferred through its authorised 'Financial Service Provider' viz. 'Taj Consultancy Services' Rs. 15 Lakhs through RTGS on 30.01.2019 through three RTGS of Rs. 5 Lakhs each to 'Corporate Debtor' and further paid Rs. 10 Lakhs by two RTGS by 5 Lakhs each on 01.02.2019.

14. According to the First Respondent / 'Financial Creditor', the said Rajeev Aggarwal had assured it that the amount of Rs. 25 Lakhs only so paid to 'Corporate Debtor' would be repaid within 3 months together with interest @ 24% p.a. from the date of payment. It is averred in Section 7 application of the First Respondent / 'Financial Creditor' that the legal notice dated 05.11.2019 of the First Respondent / 'Financial Creditor' through its Counsel, demanding the sum payable was served to the 'Corporate Debtor', but the 'Corporate Debtor' had not replied to the said notice and after expiry of more than nine months, since the 'Corporate Debtor' had not repaid any amount whatsoever to the First Respondent / 'Financial Creditor', the default was committed by the 'Corporate Debtor' in making the payment of Rs. 29,52,765/-.

15. It is to be pointed out that Section 5(8) of 'I&B' Code speaks of 'financial debt'. In fact, it is defined as a debt along with interest which is disbursed against the consideration for the time value of money and it may include any of the events specified under this provision. In short, the definition is an inclusive one. Also, it cannot be forgotten that a transaction which is not falling under any of those prescribed in the Section can also be termed as '*Financial Debt*'.

16. Section 5(7) of the Code deals with 'financial creditor'. Section 5(6) defines 'dispute' including a suit or arbitration proceedings relating to (a) the existence of the amount of debt, (b) the quality of goods or service, or (c) the breach of a representation or warranty. Also, that, a dispute must be a reasonable / genuine one and not a speculative or an illusory one.

17. Be it noted that Section 3(8) of the 'I&B' Code defines "Corporate Debtor" meaning a corporate person who owes a debt to any person. Further, as per Section 3(9) of the 'I&B' Code, a corporate person does not include any 'financial service provider'. It is to be remembered that a financial service provider' can commence proceedings as a 'Financial Creditor' against any 'Corporate Debt'.

18. Section 3(16) of the Code list the 'Financial Services'. Section 3(17) defines 'Financial Service Provider' meaning a person who provides financial services in terms of authorisation issued or registration granted by the 'Financial Service Regulator'.

19. In so far as Section 65 of the 'I&B' Code is concerned, the said section specifies penalties for fraudulent or malicious commencement of proceedings and a penalty can be levied by the 'Adjudicating Authority' ('NCLT'). If an individual initiates IRP or Liquidation proceedings either fraudulently or with malicious intent or for any purpose other than the resolution of Insolvency or Liquidation, the 'Adjudicating Authority' may impose a penalty on the concerned person as per Section 65 of the Code. If there is nothing on record to state that the 'Corporate Debtor' had not come with clean hands or suppressed any facts, the penalty will not be levied.

20. An ‘*ex facie opinion*’ is to be formed by the concerned ‘Adjudicating Authority’, to impose a penalty as per Section 65 of the Code. The concerned Authority must reach a conclusion that an individual had filed the petition for initiation of proceedings fraudulently etc. No penalty under sub-section (1) or sub-section (2) of Section 65 can be levied by the ‘Adjudicating Authority’ without recording an opinion for coming to the conclusion that a *prima facie* case is made out to state / suggest that a person ‘*fraudulently*’ or ‘*with malicious intent*’ for the purpose, other than the resolution insolvency or liquidation etc.

21. In the instant case, the real grievance of the Appellant is that the Tribunal never had the occasion to issue notice to the ‘Corporate Debtor’ in the application projected by the 1st Respondent / ‘Financial Creditor’ as per Section 7 of the ‘I&B’ Code. In this connection, this Tribunal makes a useful reference of the relevant portion of the Rule 38 of ‘National Company Law Tribunal Rules’, which speaks of ‘Service of Notices and Processes’ and the same runs as under: -

“(1) Any notice or process to be issued by the Tribunal may be served by post [or by courier – Inserted by G.S.R. 1159(E), dated 20.12.2016 (w.e.f. 20.12.2016) or at the e-mail address as provided in the petition or application or in the reply;

(2) The notice or process if to be served physically may be served in

any one of the following modes as may be directed by the Tribunal-

(a) by hand delivery through a process server or respective authorised representative;

(b) by registered post or speed post with acknowledgement due [or by courier] or

(c) service by the party himself.

1[Explanation – For the purposes of sub-rules (1)(2), the term “courier” means a person or agency which delivers the documents and provides proof of its delivery].

Xxxxxxxxxxxxxx

(5) A notice or process may also be served on an authorised representative of the applicant or the respondent, as the case may be, in any proceedings or on any person authorised to accept a notice or a process, and such service on the authorised representative shall be deemed to be a proper service.”

22. As a matter of fact, Rule 44 of 'National Company Law Tribunal Rules', 2016 deals with hearing of petition or applications - (1) The Tribunal shall notify to the parties the date and place of hearing of the petition or application in such manner as the President or a Member may, by general or special order, direct.

23. Rule 49 of 'NCLT' Rules, 2016 speaks of *Ex parte* hearing and disposal – “(1) Where on the date fixed for hearing the petition or application or on any other date to which such hearing may be adjourned, the applicant appears and the respondent does not appear when the petition or the application is called for hearing, the Tribunal may adjourn the hearing or hear and decide the petition or the application *ex parte*.

(2) Where a petition or an application has been heard *ex parte* against a respondent or respondents, such respondent or respondents may apply to the Tribunal for an order to set it aside and if such respondent or respondents satisfies the Tribunal that the notice was not duly served, or that he or they were prevented by any sufficient cause from appearing (when the petition or the application was called) for hearing, the Tribunal may make an order setting aside the *ex parte* hearing as against him or them upon such terms as it thinks fit:

Provided that where the *ex parte* hearing of the petition or application is of such nature that it cannot be set aside as against one respondent only, it may be set aside as against all or any of the other respondents also”.

24. It is to be pointed out the question of whether there is a '*debt*' and '*default*' can be looked into only if a 'Corporate Debtor' disputes the debt or comes out with a plea that there is no default, though there is a '*debt*'. Besides this, in

(Blacks' Law Dictionary 9th edition) the words '*time value*' are defined to mean the price associated with the length of time that an '*investor*' must wait and till an investment matures or the related income is earned.

25. As regards the plea taken that the 'Corporate Debtor' was never issued with a notice by the 'Adjudicating Authority' it is to be pointed out by this Appellate Tribunal that the 'Adjudicating Authority' is to follow the ingredients of 'Service of notices and processes' as per Section 38 of the 'NCLT' Rules, 2016. If a notice was not duly served upon the concerned party or he was prevented by any sufficient cause from appearing when the petition / application was called for hearing, the 'Adjudicating Authority' (Tribunal) may pass an order setting aside the *ex parte* hearing against him, on such terms as it thinks fit.

26. In the instance case, the Appellant has come out with a plea that the 'Corporate Debtor' was never issued with notice by the 'Adjudicating Authority' (Tribunal) and since the 'serving' of advance copy of the application to the 'Corporate Debtor' cannot be construed / deemed to be service of notice in the eye of Law, this Tribunal holds that the 'Adjudicating Authority' / Tribunal while reserving orders in C.P. No. IB-3228 (ND)/2019 had committed error of jurisdiction in reserving orders and passed the impugned judgement without issuing notice to the 'Corporate Debtor' which is clearly unsustainable in the eye of Law.

27. When a plea is taken before this Tribunal that there was no 'Debt' extended by the 'Financial Creditor' to the 'Corporate Debtor' and added further there was no privity of contract between the 'Financial Creditor' and 'Corporate Debtor',

this Tribunal is of the earnest opinion that in the impugned order there was no finding rendered by the 'Adjudicating Authority' as to how a third party payment became a 'Financial Debt' or how a 'Financial Creditor' had become a 'Financial Creditor', in the absence of any 'Financial Debt'.

28. It cannot be brushed aside that the third party 'Taj Consultancy' was not a party to the proceeding before the 'Adjudicating Authority' and further that Mr. Rajeev Aggarwal, according to the Appellant is neither a Director or a Shareholder of the 'Corporate Debtor' and the impugned order is conspicuously silent about this vital aspect. On this score also the impugned order of the 'Adjudicating Authority' suffers from legal infirmity.

29. Be that as it may, in the light of foregoing detailed discussions, this Tribunal to prevent an aberration of justice allows the instant Appeal by setting aside the impugned order dated 31.01.2020 in C.P. No. IB-3228 (ND)/2019 passed by the National Company Law Tribunal, New Delhi Bench-VI, New Delhi and remits back the matter to the **'Adjudicating Authority' [National Company Law Tribunal, New Delhi Bench-VI, New Delhi]** for fresh consideration and appreciation of the entire gamut of the controversies centering around the Application in C.P. No. IB-3228 (ND)/2019 (after its restoration to file) in an objective and dispassionate manner, on merits, of course after issuing due notice to the parties as per 'NCLT' Rules, 2016 and also adhering to the principles of '*natural justice*'.

30. Since the instant Appeal is allowed with aforesaid observations, the 'Corporate Debtor' is released from the rigour of the 'Corporate Insolvency

Resolution Process'. All actions taken by the 'Interim Resolution Professional' / 'Resolution Professional' and the 'Committee of Creditors', if any, are declared illegal and set aside. The 'Resolution Professional' is directed to hand over the records and assets of the 'Corporate Debtor' to the 'Promoter' / Directors of the 'Corporate Debtor' forthwith. Also, that the '**Adjudicating Authority**' [**National Company Law Tribunal, New Delhi Bench-VI, New Delhi**] is to determine the fee and cost of 'Corporate Insolvency Resolution Process' as incurred by him, which is to be borne and paid by the First Respondent / 'Financial Creditor'.

31. I.A. No. 1342/2020 seeking exemption to file certified copy of impugned order is closed with a direction being issued to the Appellant that the same shall be filed within two weeks from today.

[Justice Venugopal. M]
Member (Judicial)

[V.P. Singh]
Member (Technical)

[Shreesha Merla]
Member (Technical)

NEW DELHI

14th October, 2020

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